

## II. THE COMMISSION SHOULD NOT REQUIRE PSPS TO ACT AS INTERMEDIARIES IN TRANSFERRING COMPENSATION PAYMENTS FROM ONE IXC TO ANOTHER

The Commission should reconsider its decision to require PSPs to act as intermediaries in transferring payments from IXCs who paid less than their fair share of compensation during the Interim Period to IXCs who paid more than their fair share. With respect to the Interim Period compensation of independent PSPs, it is likely that, as a result of retroactive adjustments, some IXCs will be found to have overpaid and other to have underpaid compensation during the Interim Period.<sup>7</sup> In the *Interim Compensation Order* the Commission determines that, in this situation, a direct transfer of compensation from the “debtor” IXC to the “creditor” IXC would inappropriately complicate the true-up process. Therefore, the Commission would hold the PSP responsible for paying the entire amount of the compensation overpayment to the overpaying IXCs and then recovering that amount back from the underpaying IXCs. *Id.*, ¶ 34. This decision should be reconsidered.

### A. Requiring PSPs to Be Intermediaries Is Unfair to PSPs

The Commission’s decision causes unfairness to independent PSPs by making them the intermediaries for payments that should properly be made by one IXC to another. PSPs

---

<sup>7</sup> Unlike the Regional Bell Operating Companies, who were not eligible to receive Interim Period compensation prior to April 15, 1997, independent PSPs were eligible to receive compensation during the entire Interim Period. Independent PSPs thus received payments from IXCs at the full Interim Period rate during the early part of the Interim Period, prior to the court of appeals decision vacating the Interim Period rate. Later, IXCs either ceased to pay or cut the level of their payments drastically. Because independent PSPs received some payments during the Interim Period, the Commission’s contemplated reallocation of compensation shares is likely to bring about a situation in which some IXCs paid independent PSPs more compensation, and others paid independent PSPs less compensation, than the amounts the Commission ultimately finds to be each IXC’s “fair share” of compensation for the Interim Period as a whole.

that have been undercompensated for the Interim Period should not be compelled to give up even more of their compensation in order to make another party whole. The *Interim Compensation Order* would increase the jeopardy in which the payphone industry currently finds itself, and for no valid reason. PSPs who are already “below water” from a cost recovery perspective would be required to submerge themselves even further, and then to try to bring themselves back to the surface by recovering additional payments from hundreds of other IXCs.<sup>8</sup>

This inequity is further compounded because the nature of the compensation system virtually guarantees that IXCs can extract their overpayments from PSPs, while severely limiting PSPs’ ability to recover underpayments from IXCs. An IXC that is owed a refund by a PSP will (unless the Commission orders the contrary – see below) “help itself” to that refund by withholding future compensation payments from the PSP until the refund has been fully “collected.” A PSP has no comparable method of “helping itself” to additional payments from an IXC. It must simply bill the IXC for the underpayment, and if the IXC fails to pay the PSP appears to have no recourse but litigation.<sup>9</sup>

Moreover, to recover the refunds recouped from the PSP by a single IXC, the PSP would be required to collect the amount of the refund from hundreds of other IXCs, the vast majority of whom never paid any compensation during the Interim Period, and many of whom may never have paid any payphone compensation at all. As the *Interim*

---

<sup>8</sup> Recent Bell Company data submissions requested by FCC staff list several hundred IXCs as receiving dial-around calls from PSPs in the Interim Period. Most of these IXCs will be “underpayers” by definitions because the originally prescribed Interim Period compensation was allocated among only a handful of IXCs.

<sup>9</sup> Section 226 of the Act prohibits PSPs from blocking access code calls. The FCC has never recognized an exception to this prohibition in the case of IXCs that fail to pay compensation when due.

*Compensation Order* recognizes, these transactions are far from simple. *Id.*, ¶ 34. There are numerous issues that may arise when an IXC claims a refund from a PSP, and even more issues that could arise when a PSP attempts to claim a compensation payments from numerous IXCs who never paid compensation for the Interim Period (and may never have paid compensation at all). To begin with, there must be adequate records showing who paid how much for whom in compensation for a given payphone. Assuming adequate records, numerous additional issues may arise. Each IXC that is owed a refund must find a way to locate the PSP that collected compensation for each payphone. If that PSP no longer owns the payphone, then the IXC must determine who is currently obligated to refund compensation for that payphone.

When it comes to collecting compensation, there may be more than one party claiming the right to collect Interim Period compensation for the same payphone. Assuming that the PSP entitled to collect compensation is undisputed, that PSP must locate all the IXCs to which the Commission has allocated a compensation payment. If an IXC cannot be located or is no longer in business, then the PSP must determine who is currently responsible for compensation payments owed by that carrier for the Interim Period. The IXC, in turn, may dispute whether a given payphone was actually in place during the Interim Period or portions thereof. It is not necessarily the case that LEC verification lists are still in existence showing whether the LEC reported a payphone as in place during the Interim Period. Further, the carriers that paid compensation in the Interim Period did not all agree on which payphones were verified. Are IXCs bound by their prior verifications? Are PSPs bound by their failure to dispute prior non-verifications? Is an IXC paying for the first time bound by any previous carrier's verification, and if so, which carrier's prior verification governs? If the IXC is not bound by prior verifications,

then who has the burden of proving that a given payphone was actually in place during the Interim Period? Under the Commission's approach, each of these determinations must be made separately by the particular independent PSP and IXC involved for each payment on each of the 400,000 – 500,000 independent payphones held by IPSPs.

In short, numerous kinds of errors and disputes can occur in identifying the responsible payers and recipients of compensation adjustments. If individual PSPs are responsible for collection, many will find it is not worth the cost. There are several thousand independent PSPs. If independent PSPs are required to bear the burden of recovering from hundreds of “underpaying” IXCs the refunds paid to a few “overpaying” IXCs, the average amount that each independent PSP will collect from each “underpaying” IXC will be extremely small. For example, if the amount to be recovered is \$90/phone, and there were 450,000 independent payphones and 2,000 PSPs, then each PSP must recover an average of  $\$90 \times 450,000 / 2,000$ , or \$20,250.<sup>10</sup> If there are approximately 300 underpaying IXCs, then the average recovery that each PSP would obtain from each IXC is  $\$67.50 (20,250 / 300)$ .<sup>11</sup>

By contrast, there are unlikely to be more than two or three “overpaying” IXCs. *See* II.B., below. If there are three overpaying IXCs and they are required to recover their own overpayments from underpaying IXCs, then the average amount that each IXC must recover is  $\$90 / 3 \times 450,000 / 300$ , or \$45,000.00. By placing the burden on thousands of PSPs<sup>12</sup> – rather than on the few IXCs that overpaid during the Interim Period – to collect

---

<sup>10</sup> These amounts are intended to be illustrative only, but serve to indicate the order of magnitude of the average recovery.

<sup>11</sup> Merely processing an undisputed claim would consume substantially more resources than \$67.50 worth of a clerical worker's time.

<sup>12</sup> Even if it is feasible to aggregate individual PSPs' claims, the individual PSP's will still incur substantial costs – probably exceeding the average amount recovered – in (footnote continued on next page)

small amounts of compensation from each of hundreds of IXC's, the Commission is placing the collection burden on the parties least able to bear it, *i.e.*, least able to implement collection cost-effectively.<sup>13</sup>

#### **B. The Commission's Decision Greatly Increases the Overall Costs of the True-Up**

Contrary to the Commission's findings, the approach taken in the *Interim Compensation Order* actually complicates rather than simplifies the Interim Period true-up process. As explained above, there are several thousand PSPs in the United States, and several hundred carriers that are subject to compensation payments. The number of individual transactions that would be required to complete the true-up process under the Commission's approach is thus in the neighborhood of a million transactions.<sup>14</sup>

In view of the complexities associated with these transactions, as discussed in II.A. above, much of the total compensation adjustment ordered for the Interim Period is likely to go uncollected if PSPs are required to act as intermediaries. On the other hand, the

---

preparing and submitting billing information, responding to verification requests, and processing the payments received. Further, the aggregators cost of aggregating them and administering such a large number of small claims is likely to be so great as to preclude it from being economically viable to aggregate any but the largest claims.

<sup>13</sup> In determining the cost-based compensation rate in the *Third Payphone Order*, the Commission rejected the inclusion of cost components for collection costs and uncollectables. *Id.*, ¶¶ 160-64. It is therefore incumbent on the Commission to design a true-up process that minimizes collection costs and uncollectables. If the Commission chooses a true-up process that imposes unnecessary collection costs and uncollectables on PSPs, then it should add an appropriate collection cost component to the retroactively applicable compensation rate.

<sup>14</sup> For example, if there are 3,000 PSPs and each PSP originated calls for the same 300 carriers required to pay compensation, the total number of transactions required in order to complete the true-up is 900,000. (3,000 x 300 = 900,000.)

amount that goes uncollected would be greatly reduced if the Commission reconsiders and requires direct IXC-to-IXC payments wherever feasible.

IXC-to-IXC payments would be especially efficient because there are unlikely to be more than two or three overpayers who would need to recoup compensation paid during the Interim Period. Because only a handful of IXCs actually paid any compensation during the Interim Period, it is likely that only two or three IXCs, at most, will be found to have overpaid compensation during the Interim Period.

In light of these realities, the total cost of collection would be greatly reduced, and the total amount collected greatly increased, if the Commission requires the few overpaying IXCs to collect their overpayments directly from the underpaying or nonpaying IXCs, rather than distributing that collection burden among thousands of independent PSPs. For these few IXCs to collect their overpayments directly from the underpaying or nonpaying IXCs would reduce dramatically the number of transactions – and the associated cost – required to complete the bulk of the payment transfers involved in the true-up.<sup>15</sup>

---

<sup>15</sup> To take the example given in II.A. above, suppose that three IXCs overpaid independent PSPs by a total of \$90/payphone. If each of 2,000 PSPs is required to refund overpayments to the underpaying IXCs and collect underpayments from the remaining 300 IXCs, then the total number of transactions required will be 606,000.  $((2,000 \times 3) + (3,000 \times 300) = 606,000.)$  As noted above, the average amount to be collected in each transaction would be about \$67.50. PSPs are likely to discover that the cost of collecting most of the payments is not worth the cost of the transaction.

Even if PSPs were entitled to an additional payment, say \$30/phone, from underpaying IXCs – beyond the \$90 amount necessary to pay off the overpaying IXCs – the average recovery per transaction would be only \$90.00 – still very unlikely to pay for the collection cost.

On the other hand, if the three overpaying IXCs are required to collect their \$90/payphone overpayments directly – and *pro rata* – from the 300 underpaying IXCs, then each overpaying IXC would be collecting an average of \$45,000 from each underpaying IXC. The overpaying IXCs are far more likely to find that it is worth the cost to collect the amounts owed them by every underpaying IXC.

In light of the far greater complexity and the manifest inequity that results when PSPs must act as intermediaries for settlements between underpaying and overpaying IXC's, the Commission should rule that overpaying IXC's must look first to underpaying IXC's to collect the compensation due.

Such a ruling would not be unduly burdensome for the Commission to implement. The amounts of compensation owed by each IXC for the Interim Period are to be determined by the Commission in this proceeding. As for the amounts actually paid, the few IXC's that actually paid compensation during the Interim Period generally paid each independent PSP an equal amount per payphone. Thus, it is a relatively simple matter for the Commission to determine the amount by which each IXC has been overpaid or underpaid for the Interim Period. Having made that determination, all the Commission needs to do is allocate to each underpaying IXC a pro rata share of the total owed to each overpaying IXC, and rule that the remaining underpayment should be paid to PSPs.

This approach is totally consistent with the governing statute and the court's decision in *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, (D.C. Cir. 1997), *cert. denied*, *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) ("IPTA"). Nothing in Section 276 or IPTA prevents the Commission from correcting prior errors in payphone compensation payments by means of a carrier-to-carrier true-up.

### **III. THE COMMISSION SHOULD REQUIRE IXCS TO COLLECT RETROACTIVE REFUNDS IN THE MANNER THAT BILLS ARE NORMALLY COLLECTED, NOT BY SUBTRACTING CLAIMED REFUNDS FROM FUTURE COMPENSATION PAYMENTS.**

Even if the Commission does not reconsider its decision to require PSPs to be intermediaries between overpaying and underpaying IXC's, the Commission should not

permit IXCs to collect retroactive refunds by subtracting the amount claimed as a refund from future payments. Rather, the IXCs should be required to bill PSPs for the amount of the refund and await payment, just as PSPs must do when collecting retroactive compensation from IXCs. This requirement is necessary to ensure that IXC's have adequate motivation to cooperate in identifying errors and misdirected refund claims. In addition, such a requirement will make the true-up process more workable by bringing the relationship of the parties closer to a normal telecommunications business model.

As noted above, IXCs that have concluded that they have overpaid a PSP typically extract a "refund" from the PSP by withholding future compensation payments from the PSP until the refund has been fully "collected." Thus, at each point in the process it is the PSP's burden to disprove that it owes a refund, or to correct any errors made by the IXC in calculating the amount of the refund. As discussed in III. above, there are likely to be numerous errors in determining retroactive compensation adjustments, due to the age of the claims and the uncertainties involved in identifying which party is responsible for the compensation payments of the numerous PSPs who have gone bankrupt or sold out since 1997. There may also be uncertainty as to which IXC holds the refund rights of a defunct IXC. The PSP will bear the burden of correcting all such errors – as well as errors involved in claims against underpaying IXCs<sup>16</sup> – because the IXC will be holding the money. If the PSP cannot convince the IXC that a refund claim is erroneous, it becomes the PSP's burden to initiate litigation to reclaim the amount the IXC has unilaterally refunded to itself from the compensation due.

---

<sup>16</sup> By contrast, a PSP has no comparable method of "helping itself" when it is owed additional payments by an IXC. The same types of errors and disputes are likely to occur, but the PSP must simply bill the IXC for the amount of underpayment it believes it is entitled to collect. Again, if the IXC fails to pay the PSP appears to have no recourse but litigation.

In the context of a retroactive true-up, at least, the Commission should not allow IXC's to unilaterally claim refunds by deducting them from future compensation payments. The ability to do so effectively removes the IXC's incentive to cooperate in identifying and resolving erroneous refund claims. Further, as APCC has repeatedly pointed out, retroactive compensation adjustments are a matter of equity. It is not the PSPs' fault that a true-up is deemed necessary. Therefore, to ensure the accuracy of the true-up process and fairness to PSPs, IXC's should not be required to verify disputed refund claims prior to payment.<sup>17</sup> The Commission has recognized a need to bring PSP/IXC relations into a model more akin to the way payments are ordinarily made in the telecommunications industry rather than allowing PSP/IXC issues to be resolved through unilateral self-help. *Cf. Bell Atlantic-Delaware et al. v. Frontier Communications Services, Inc.*, 15 FCC Rcd 7475 (2000), *aff'd* *Global Crossing Telecommunications v. FCC*, 259 F.3d 740 (D.C. Cir. 2001); *Total Telecommunications Services v. AT&T*, 16 FCC Rcd 5726 (2001); *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, 16 FCC Rcd 19158 (2001).

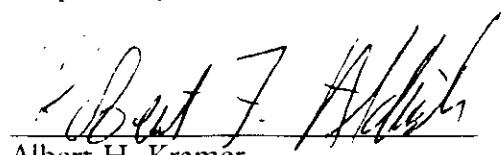
Therefore, the Commission should rule that IXC's must not collect any retroactive refund awarded in this proceeding the normal methods by which bills are collected. Such a requirement will help ensure that IXC's, who are likely to hold critical information needed to determine the accuracy of retroactive refunds, have an adequate incentive to cooperate in ensuring that such payments are accurately calculated and are collected by and from the correct parties.

---

<sup>17</sup> When IXC's are paying compensation to PSPs, PSPs are routinely required to verify the existence of and ownership of payphones prior to payment, and receive no payment until the IXC has satisfied itself that the amount to be paid is accurate.

Dated: April 3, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

Albert H. Kramer  
Robert F. Aldrich  
Robert N. Felgar

2101 L Street, N.W.  
Washington, D.C. 20037-1526  
(202)828-2226

Attorneys for the American Public  
Communications Council

## CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2002, I caused a copy of the foregoing Petition for Reconsideration to be sent via first-class mail to the following:

Craig Stroup  
Federal Communications Commission  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W., Room 6-A104  
Washington, DC 20554

Jeff Carlisle  
Federal Communications Commission  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W., Room 5-C356  
Washington, DC 20554

Lynne Milne  
Federal Communications Commission  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W., Room 5-A365  
Washington, DC 20554

Jon Stover  
Federal Communications Commission  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, S.W., Room 5-C346  
Washington, DC 20554

Steven A. Augustino  
Darius B. Withers  
Kelley Drye & Warren LLP  
1200 19<sup>th</sup> Street, N.W.  
Suite 500  
Washington, DC 20036-2423

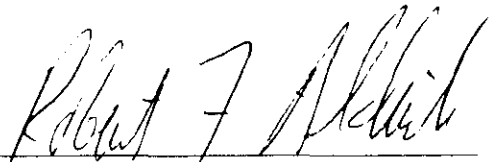
Michael K. Kellogg  
Aaron M. Panner  
Kellogg, Huber, Hansen, Todd & Evans,  
P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036

Mark C. Rosenblum  
Richard H. Rubin  
AT&T Corp.  
295 North Maple Avenue  
Room 325213  
Basking Ridge, NJ 07920

Leon M. Kestenbaum  
Jay C. Keithley  
H. Richard Juhnke  
Sprint Corporation  
401 9<sup>th</sup> Street, N.W., Suite 400  
Washington, DC 20004

Ky E. Kirby  
Kathleen L. Greenan  
Gregg Strumberger  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
Washington, DC 20007

Cheryl A. Tritt  
Frank W. Krogh  
Morrison & Foerster, LLP  
2000 Pennsylvania Avenue, N.W.  
Suite 5500  
Washington, DC 20006-1888

  
Robert F. Aldrich